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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

RAJINDER POONI et al.,

Plaintiffs and Appellants,

v.

BSI FINANCIAL SERVICES,

Defendant and Respondent.

C081369

(Super. Ct. No.
34201300135762CUORGDS)

After their home was foreclosed, plaintiffs Rajinder Pooni and Ravinder Kang sued their loan servicer BSI Financial Services (BSI)¹ for claims including misrepresentation and violations of the Unfair Competition Law (Bus. & Prof., Code § 17200).² Plaintiffs appealed after the trial court granted BSI's motion for judgment on

¹ U.S. Bank and another party were later added as defendants but are not party to this appeal. As we discuss *post*, in a prior appeal involving U.S. Bank, we rejected contentions similar to those raised here.

² Undesignated statutory claims are to the Business and Professions Code.

the pleadings without leave to amend. On appeal, plaintiffs contend reversal is required because their third amended complaint stated a claim for fraud, negligent misrepresentation, and violations of the Unfair Competition Law.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal follows the trial court's granting of BSI's motion for judgment on the pleading as to plaintiffs' third amended complaint. In its ruling, the trial court relied on filings from plaintiffs' 2011 bankruptcy case. Those filings contradicted many of plaintiffs' allegations. The filings were also relied on when the trial court sustained defendant U.S. Bank's demurrer to the third amended complaint. This court also relied on the filings, as well as those in plaintiffs' 2012 bankruptcy case, in affirming the trial court's ruling as to U.S. Bank.

The Third Amended Complaint

Following several successful demurrers, plaintiffs filed their third amended complaint alleging *inter alia* fraud, negligent misrepresentation, and violations of the Unfair Competition Law. Plaintiffs alleged that in 2006 they bought a home, and as of May 2009, they were current on their mortgage payments.

In May 2009, plaintiffs contacted their loan servicer (a different defendant) about a loan modification. They were told their loan could not be modified if their mortgage payments were current. But, they were told, if they missed payments in order to seek a loan modification, it would not affect their credit or cause a foreclosure proceeding. Plaintiffs "went late" and applied for a loan modification.

Plaintiffs were placed in a trial modification program. They made three trial payments as requested and continued to make payments under the trial plan. But they never received a final loan modification.

The 2010 Misrepresentation

In mid-2010³, plaintiffs were told BSI would be their new loan servicer. They contacted BSI about the loan modification but were told BSI would not consider them for a modification unless they first stopped making payments under the trial payment plan. They were told they would not be reported late to credit reporting agencies, and BSI would not initiate foreclosure if they stopped making payments.

Plaintiffs stopped making payments and reapplied for a loan modification. In October, they were denied a loan modification and resumed making monthly payments. They later learned they had been reported late to credit agencies.

The 2011 Misrepresentation

In June 2011, plaintiffs contacted BSI about reapplying for a loan modification. They were again told to stop making payments in order to apply for a modification, and doing so would not affect their credit. Plaintiffs stopped making payments and applied for a modification. They later learned they had again been reported late to credit agencies.

The 2012 Misrepresentation

Between June 2011 and September 2012, BSI representatives assured plaintiffs their application was complete, and they would receive a final determination shortly. But unbeknownst to plaintiffs, BSI and another defendant caused a notice of default to be recorded in August 2011. And in July 2012, a notice of trustee sale was recorded.⁴

In August 2012, BSI told plaintiffs their home would not be foreclosed because their loan modification was under review. In September, they were again told their application was under review. That month, defendant U.S. Bank sold their home.

³ The complaint is inconsistent about whether the 2010 misrepresentation occurred in June or August.

⁴ That same month, all interest in the property was transferred to U.S. Bank.

Plaintiffs filed the instant suit in early 2013. They alleged that at all relevant times, they were willing and able to tender the amount necessary to reinstate their loan had they had notice of the impending sale.

BSI's Motion For Judgment On The Pleadings

In late 2015, after answering the third amended complaint, BSI moved for judgment on the pleadings. The trial court granted the motion without leave to amend. As to the fraud and negligent misrepresentation claims, the court took judicial notice of plaintiffs' 2011 bankruptcy filings and determined they establish that plaintiffs could not have detrimentally relied on any alleged misrepresentation. As to the Unfair Competition Law claims, the court concluded the bankruptcy filings established that plaintiffs lost no money or property, depriving them of standing for the claim. And to the extent that claim was based on any fraud claim, it failed along with those claims.

The 2011 and 2012 Bankruptcy Petitions⁵

Plaintiffs filed their chapter 13 bankruptcy petition, on which the trial court relied, in December 2011. The petition stated plaintiffs were \$60,000 in arrears on their home. BSI, on behalf of U.S. Bank, however, filed a proof of claim, stating arrears as \$175,646.57. It also reported that plaintiffs had missed 38 payments since late 2008. Plaintiffs then filed an amended chapter 13 plan, adopting the \$175,646.57 arrears figure.

The bankruptcy court subsequently denied plaintiffs' motion to confirm the amended plan and ultimately dismissed the bankruptcy case in May 2012 for failure to make plan payments.

In July 2012, plaintiffs again petitioned for bankruptcy, stating their arrears on the home as \$65,000.⁶ Three months later, their bankruptcy case was conditionally

⁵ Plaintiffs' request that we take judicial notice of their 2012 bankruptcy filings is granted. BSI's request to augment the record to include the filings relied upon by the trial court, including plaintiffs' 2011 bankruptcy filings, is also granted.

dismissed — after the court found plaintiffs were no more likely to be successful than in their previous bankruptcy case — and offered plaintiffs seven days to convert their case into a chapter 7 bankruptcy.⁷

The U.S. Bank Appeal⁸

We considered the bankruptcy filings in the prior appeal involving defendant U.S. Bank. In late 2014 (a year before BSI’s motion for judgment on the pleadings), defendant U.S. Bank successfully demurred to the third amended complaint. Plaintiffs appealed, arguing *inter alia*, that they had stated a claim for fraud, negligent misrepresentation, and violations of the Unfair Competition Law.

This court affirmed, concluding the 2012 bankruptcy filings, which showed plaintiffs had access to only \$320 at the time of filing, established that plaintiffs could not have reinstated their loan.⁹ Thus, the fraud and misrepresentation claims were deficient for failure to specifically allege how plaintiffs’ loan could have been reinstated before foreclosure. Further, the Unfair Competition Law claim, which was tethered to the other causes of action, failed along with the other claims.

We also concluded plaintiffs could not cure their pleading defects by amendment. We noted that any change in their circumstances would have to have occurred before

⁶ In schedule B of their 2012 petition, plaintiffs reported their personal property included: “100% Owner of Golden Pacific Transport LLC . . . Good Will \$500[;] accounts receivable; \$22K less 83% for drivers = \$3730[;] \$417k in income for 6 months \$381k expenses” Schedules I and J, for income and expenditures, stated plaintiffs’ combined monthly income as \$6,400 and expenses as \$2,900, which did not include a mortgage payment. Schedule C listed \$320 in cash and savings.

⁷ The record is silent as to whether this was done.

⁸ The facts are taken from our prior opinion, *Pooni v. U.S. Bank*, N.A. (Cal. Ct. App., Aug. 9, 2016, No. C078806) 2016 WL 4198380.

⁹ We granted U.S. Bank’s request to take judicial notice of the 2012 bankruptcy filings.

August 2012, and plaintiffs' pleading filed between August 2013 and September 2014 failed to allege any change of circumstances. Plaintiffs' assertion that they could have secured loans from family, friends, or other means was nebulous and speculative.

DISCUSSION

I. The 2010 and 2011 Fraud and Misrepresentation Claims

In this appeal, plaintiffs contend their third amended complaint stated a claim for fraud or negligent misrepresentation based on BSI's 2010 and 2011 alleged misrepresentations that missing a payment to pursue a loan modification would not cause adverse credit consequences. They argue their bankruptcy filings are irrelevant to those claims as they were not premised on plaintiffs' ability to reinstate their loan. Rather, the claims were premised on the resulting damage to plaintiffs' credit. Thus, unlike the 2012 misrepresentation claims, the bankruptcy filings do not give grounds to dismiss the 2010 and 2011 misrepresentation claims. We disagree.

A claim for negligent misrepresentation requires: “(1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage.” (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196.) A claim for fraud also requires “knowledge of falsity” and “intent to defraud,” and must be pled with specificity. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173-174.)

We review a ruling on a motion for judgment on the pleading as we would a ruling on a demurrer. (*Estate of Dayan* (2016) 5 Cal.App.5th 29, 39-40.) “ ‘We treat the pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.’ ” (*Id.* at p. 40.) We also consider evidence outside the pleadings which the trial court considered without objection. (*Ibid.*) We then determine de novo whether the facts alleged suffice to state a claim. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515.)

Here, the claims flowing from the alleged 2010 and 2011 misrepresentations fail for want of reliance and resulting damage. As shown by the 2011 bankruptcy filings, plaintiffs indisputably owed \$175,646.57 in arrears on the property by December 2011. Further, as BSI's represented, without objection, that \$175,646.57 figure comprised of 38 missing mortgage payments dating back to late 2008.

Given the undisputed amount in arrears, the only reasonable conclusion is that any alleged 2010 and 2011 misrepresentations, inducing plaintiffs into missing payments, occurred while plaintiffs were already missing some, if not all, payments. (See *Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 878 [the court disregards facts pled that are inconsistent with those pled in separate actions]; *Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400 ["Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains ... allegations contrary to facts which are judicially noticed' "].) Thus, plaintiffs can show neither reliance nor resulting damage to their credit from any misrepresentation.

Plaintiffs, however, respond that the bankruptcy filings in fact support their allegation that they had been making payments prior to the 2010 and 2011 misrepresentations. They point to a page in BSI's proof of claim captioned, "Statement of Amount Necessary to Cure Default as of the Petition Date," which states the last payment received by creditor as "10/1/2010." The page also lists the arrears as \$175,646.57, and the number of missing payments as 38. They argue that shows they were making payments leading up to the misrepresentations. We are not persuaded.

Three pages later in the proof of claim, it reflects a \$4,512.04 arrearage for a "10/1/2010" payment. That arrearage is totaled with the other 37 missing payments (of varying amounts) to arrive at the \$175,646.57 total figure — a figure plaintiffs adopted in their amended bankruptcy petition. In sum, the reference to a last payment of "10/1/2010" does not cause us to doubt the conclusion that at the time of the alleged misrepresentations plaintiffs were not making payments.

II. The August 2012 Fraud and Misrepresentation Claims

As to their 2012 misrepresentation claims, plaintiffs contend they could have amended their complaint to show they had the means to reinstate their loan. In support, they note their 2012 bankruptcy filings show Pooni was the sole owner of a business that grossed \$417,000 in six months. Further, the business had earned \$48,000 in the 12 months preceding the bankruptcy petition, and Pooni's average future monthly gross income was estimated at \$6,000 a month. Plaintiffs argue that lends credence to their claim that they could have borrowed money from family or friends to reinstate their loan at the time of the 2012 misrepresentation, and therefore leave to amend should be granted. We disagree.

We rejected a nearly identical argument in plaintiffs' prior appeal. We explained that plaintiffs' "nonspecific suggestion that they could have obtained a loan from family, friends, or 'other means' is essentially speculation" We noted that to demonstrate the possibility of curing a defect, on appeal, a plaintiff must set forth " 'factual and specific, not vague or conclusionary' " allegations and " 'show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.' " (See *Green Valley Landowners Assn. v. City of Vallejo* (2015) 241 Cal.App.4th 425, 432.)

Plaintiffs' present argument incorporating their 2012 bankruptcy filing does not render their nebulous proposed allegation, of obtaining a loan from family or friends, any more specific. Indeed, plaintiffs point to the \$417,000 yearly gross figure but would apparently have us overlook the accompanying \$381,000 in expenses. Similarly, they point to \$6,000 in expected monthly income, but not the \$2,900 monthly expenses, which did not include a mortgage payment. And they fail to address what this court relied on in plaintiffs' prior appeal: that plaintiffs' 2012 bankruptcy filings showed plaintiffs had access to only \$320 at the time of filing. In short, nothing in plaintiffs' 2012 bankruptcy

petition works to render their proposed allegation of obtaining a loan “from family and friends” sufficiently specific.

II. The Unfair Competition Law claims

As to their Unfair Competition Law (§ 17200) claim, plaintiffs agree the claim is tethered to their claims for fraud and negligent misrepresentation. (See *Aleksick v. 7-Eleven, Inc.* (2012) 205 Cal.App.4th 1176, 1185 [section 17200 makes violations of other unlawful business practices independently actionable].)

Having concluded that plaintiffs failed to state a claim for fraud and negligent misrepresentation, we conclude the Unfair Competition Law claims also fails.

DISPOSITION

The judgment is affirmed. Plaintiffs shall pay BSI’s costs on appeal. (See Cal. Rules of Court, rule 8.278(a)(1), (5).)

/s/
MURRAY, J.

We concur:

/s/
HULL, Acting P. J.

/s/
DUARTE, J.